

DEPARTMENT OF STATE REVENUE

**LETTER OF FINDINGS NUMBER: 00-0238
SALES AND USE TAX
FOR TAX PERIODS: 1996-1997**

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Issues

1. Sales and Use Tax: Riverboat Casino

Authority: IC 6-2.5-3-2(a),

The taxpayer protests the imposition of tax on its riverboat casino.

2. Sales and Use Tax: Printing and Duplication

Authority: IC 6-2.5-2-1 (b).

The taxpayer protests the imposition of tax on purchases from a printing and duplication company.

3. Tax Administration: Negligence Penalty

Authority: IC 6-8.1-10-2.1, 45 IAC 15-11-2 (b).

The taxpayer protests the imposition of penalty.

Statement of Facts

The taxpayer operates a casino riverboat. After an audit, the taxpayer was assessed additional use tax, interest and penalty. The taxpayer protested the assessment and a hearing was held.

1. Sales and Use Tax: Riverboat Casino

Pursuant to IC 6-2.5-3-2(a), Indiana imposes an excise tax on tangible personal property stored, used, or consumed in Indiana. In 1996 the taxpayer purchased a new gaming vessel which was constructed in Florida and delivered to Indiana. The taxpayer self assessed use tax on \$25,779,715.00. However, the total cost of the gaming vessel was \$33,879,715.00. The audit assessed tax on the difference of \$8,100,000.00. The taxpayer protested this assessment and claimed a refund on the monies self assessed. Only the protest will be addressed in this Letter of Findings.

The taxpayer protests the assessment claiming that the riverboat casino is actually real estate and therefore not subject to the use tax which is only imposed on tangible personal property. The taxpayer bases its contention on the definition of real property found in the law governing the Indiana property tax, IC 6.1-1-15 as follows:

“Real Property” means:

- (1) land located within this state;
- (2) a building or fixture situated on land located within this state;
- (3) an appurtenance to land located within this state;
- (4) an estate in land located within this state, or an estate, right, or privilege in mines located on or minerals, including but not limited to oil or gas, located in the land, if the estate, right, or privilege is distinct from the ownership of the surface of the land; and
- (5) notwithstanding IC 6–6-6-7, a riverboat licensed under the provisions of IC 4-33 for which the state board of tax commissioners shall prescribe standards to be used by township assessors.

The first four items in the property tax definition of real property are the commonly understood definitions of real property. The last item concerning the classification of riverboats such as the taxpayer’s riverboat was added in 1995 to specifically denominate riverboat casinos as real property for purposes of the tax on real property. The fact that the legislature considered it necessary to specifically classify riverboats as real property for purposes of property tax when all other property in the state is classified pursuant to the first four items indicates that the classification is counterintuitive to the generally held understanding of a riverboat as tangible personal property. Although the Department may look to the classification of property for property tax purposes to assist in determining whether difficult to classify property is tangible personal property for sales tax purposes, it is not required to do so.

The issue to be determined is whether the taxpayer’s gaming vessel is tangible personal property for sales and use tax purposes. “Tangible” is defined as “discernable by the touch or capable of being touched” in Webster’s II New Riverside University Dictionary, The Riverside Publishing Company, 1988 at page 1182. The same dictionary at page 877 defines “personal property” as “temporary or movable property as distinguished real property.” A gaming vessel is movable property that can be

touched. The boat actually has a pilot and life preservers for travel in the water. It operates under authority of the U.S. Department of Transportation. It is not permanently attached to the land. Generally, then, the taxpayer's riverboat casino would be considered tangible personal property.

The Sales and Use Tax Regulations do not give a definition of tangible personal property for sales and use tax purposes. They do, however, refer to boats and watercraft as subject to the sales and use tax. 45 IAC 2.2-3-6 (a)(2) defines "watercraft" as

a contrivance used or designed for navigation on water, including a vessel, boat, motor vessel, steam vessel, sailboat, vessel operated by machinery either permanently or temporarily affixed, scow, tugboat or any marine equipment that is capable of carrying passengers, except a ferry.

The taxpayer's riverboat casino clearly falls within the sales and use tax regulatory definition of "watercraft." 45 IAC 2.2-3-6(c)(2) specifically imposes use tax on Indiana watercraft purchased out of state. By these standards, the taxpayer's riverboat casino is tangible personal property and subject to the sales and use tax. Since there is a specific definition and imposition of sales and use tax on boats in the Sales and Use Tax Regulations, the Indiana Department of Revenue does not need to look to the property tax statute for assistance in classification of the gaming vessel as tangible personal property subject to the sales and use tax.

Alternatively, the taxpayer contends that if the Department finds that its gaming vessel is tangible personal property and qualifies for imposition of the sales and use taxes, then that gaming vessel qualifies for the public transportation exemption found at IC 6-2.5-5-27 as follows:

Transactions involving tangible personal property and services are exempt from the state gross retail tax, if the person acquiring the property or service directly uses or consumes it in providing public transportation for persons or property.

To bolster its argument that the riverboat casino qualifies for the provision of public transportation exemption, the taxpayer offers evidence that the vessel's operation is regulated by the U.S. Department of Transportation and that those regulations are enforced by the U.S. Coast Guard.

The only purpose of the taxpayer's gaming vessel is the provision of an opportunity for people to gamble legally. Persons seeking transportation in the state of Indiana do not consider the taxpayer's services. The previously cited sales and use tax regulation specifically states that a ferry would not be subject to the imposition of tax. The taxpayer's boat can not be considered a ferry in that it doesn't transport anyone from one point to another point. At most the

boat moves people in Indiana waters so that they can gamble legally. The taxpayer's riverboat casino does not qualify for the public transportation exemption from the sales and use tax.

Finding

The taxpayer's first point of protest is denied.

2. Sales and Use Tax: Printing and Duplication

Discussion

The audit assessed use tax on items purchased from a printing and duplication company. The taxpayer contends that it paid sales tax when it purchased the items. The taxpayer presented a letter from the printing and duplicating concern's accountant indicating that sales tax was paid at the time of purchase. The taxpayer also presented internally produced purchase orders indicating that sales tax was paid.

Sales tax is paid pursuant to the following provision of IC 6-2.5-2-1 (b).

The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

In this case, the taxpayer purchased printing and duplication supplies from a company that did not list the price separately on the invoice as required by the law. Further, the company was not registered as a retail merchant for collecting of sales tax with the Indiana Department of Revenue. Therefore, if the merchant collected sales tax, it did not do so as an agent for the state. The transaction did not comply with the requirements of the law.

Finding

This point of the taxpayer's protest is denied.

3. Tax Administration: Negligence Penalty

Discussion

Taxpayer's final point of protest concerns the imposition of the ten per cent negligence penalty pursuant to IC 6-8.1-10-2.1. Indiana Regulation 45 IAC 15-11-2 (b) clarifies the standard for the imposition of the negligence penalty as follows:

"Negligence", on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an

ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence.

The audit assessed use tax on purchases in addition to those under protest. For example, the taxpayer failed to pay retail sales tax or remit use tax on many items clearly subject to the use tax such as dolls, sportswear, logos and bigheads costumes. The taxpayer's actions meet the requisite negligence standard.

Finding

Taxpayer's final point of protest is denied.

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